

1 BRIAN S. KABATECK, SBN 152054
2 (bsk@kbklawyers.com)
3 RICHARD L. KELLNER, SBN 171416
4 (rlk@kbklawyers.com)
5 ALFREDO TORRIJOS SBN 222458
6 (at@kbklawyers.com)
KABATECK BROWN KELLNER LLP
644 South Figueroa Street
Los Angeles, California 90017
Telephone: (213) 217-5000
Facsimile: (213) 217-5010

⁷ Attorneys for Plaintiff RK West, Inc.

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION**

12 RK WEST, INC., A California
13 corporation d/b/a Malibu Wholesale,
14 individually and on behalf of all
others similarly situated.

16 Plaintiff

17 vs.
18 GOOGLE, INC., a Delaware
Corporation.

Defendants.

CASE NO. C 08-03452

Judge: Hon. Ronald M. Whyte

**DECLARATION OF BRIAN S.
KABATECK IN SUPPORT OF
PLAINTIFF RK WEST, INC.'S
ADMINISTRATIVE MOTION TO
CONSIDER WHETHER CASES
SHOULD BE RELATED**

22 1. I am an attorney duly licensed by the State of California and am admitted to
23 practice before this Court. I am a managing partner at Kabateck Brown Kellner LLP,
24 attorneys of record for plaintiff in *RK West, Inc. v. Google, Inc.*, Case No. C08-03452 (“*RK*
25 *West*”). I make this declaration in support of plaintiff RK West, Inc.’s Administrative
26 Motion to Consider Whether Cases Should Be Related. The matters set forth herein are of
27 my own personal knowledge, and if called and sworn as a witness I could competently
28 testify regarding them.

1 2. Attached hereto as Exhibit A is a true and correct copy of a complaint
2 captioned *RK West, Inc. v. Google, Inc.*, Case No. 08-03452- filed in the Northern District
3 of California, pending before the Honorable Ronald M. Whyte.

4 3. *RK West* is a proposed class action on behalf of Google AdWords customers.
5 *Levitte, RK West* and *Pulaski* all assert claims for violations of the California Business and
6 Professions Code, fraudulent concealment and unjust enrichment against the same sole
7 defendant, Google, Inc.

8 4. A stipulation pursuant to Civil Local Rule 7-11(a) could not be obtained
9 because defendant asked plaintiff's counsel to stipulate that all related cases be moved
10 before Judge Whyte; this is wholly inappropriate.

11 5. Defendant contends that *Almeida v. Google, Inc.*, Case No. 08-02088, *Levitte,*
12 *RK West, and Pulaski* are all related cases. Defendant further contends that if the Court
13 relates these cases, the cases should all be moved before Judge Whyte because *Almeida*, the
14 earliest filing, is already before Judge Whyte. Defendant's position is premised on a weak
15 attempt to relate *Levitte, RK West, and Pulaski* to *Almeida*. *Almeida* is a putative class
16 action which, under Civil L.R. 3-12, cannot logically be related to *Levitte, RK West, and*
17 *Pulaski*. Plaintiff Almeida seeks relief on behalf of a putative class of persons which is
18 *wholly* distinguished from the *Levitte, RK West* and *Pulaski* classes. Moreover, the causes
19 of action raised in *Almeida* call for a determination of questions of law and fact *entirely*
20 *different* from those called for by *Levitte, RK West, and Pulaski*.

21 6. *Levitte, RK West* and *Pulaski* all are class actions that deal with the issue of
22 misrepresentations by Google, Inc. in connection with "domain parking." Those allegations
23 are not covered at all by the *Almeida* class action, which deals with the issue of CPC content
24 bids. It is quite likely that there are members of the *Levitte, RK West* and *Pulaski* class
25 actions who are not members of the *Almeida* class action.

26 7. The *Levitte* action is the low-numbered case for purposes of relating. *Levitte* is
27 presently pending before Judge James Ware; therefore, if the Court relates *Levitte, RK West,*
28

1 and *Pulaski*, then the appropriate judge to hear the cases is Judge Ware, and not Judge
2 Whyte. For these reasons plaintiff's counsel did not stipulate that the cases are related.
3

4 I declare under penalty of perjury under the laws of the United States that the
5 foregoing is true and correct. Executed this 29th day of August, 2008 at Los Angeles,
6 California.

7
8 /s/ Brian S. Kabateck
9 Brian S. Kabateck
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Exhibit A

1 BRIAN S. KABATECK, SBN 152054
 2 (bsk@kbklawyers.com)
 3 RICHARD L. KELLNER, SBN 171416
 4 (rlk@kbklawyers.com)
 5 ALFREDO TORRIJOS, SBN 222458.
 6 (at@kbklawyers.com)
 7 KABATECK BROWN KELLNER LLP
 8 644 South Figueroa Street
 9 Los Angeles, California 90017
 10 Telephone: (213) 217-5000
 11 Facsimile: (213) 217-5010
 12 Attorneys for Plaintiff
 13 RK West, Inc.
 14

ADR

E-filing

FILED

JUL 17 2008

RICHARD W. WIEKING
CLERK, U.S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

FILED

9 UNITED STATES DISTRICT COURT JUL 17 2008
 10 NORTHERN DISTRICT OF CALIFORNIA

RICHARD W. WIEKING
CLERK, U.S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

CASE NO.

C 08 03452
CLASS ACTION COMPLAINT

RS

JURY TRIAL DEMANDED

12 RK West, Inc., a California corporation
 13 d/b/a Malibu Wholesale,
 14 individually and on Behalf of All Others
 15 Similarly Situated,

Plaintiff,

v.

18 GOOGLE, INC., a Delaware
 19 Corporation; and DOES 1 through 10,
 20 inclusive,

Defendants.

21
 22 Plaintiff RK West, Inc. d/b/a Malibu Sales ("Plaintiff"), individually and on behalf
 23 of the class described below, by its attorneys, makes the following allegations pursuant to
 24 the investigation of its counsel and based upon information and belief except as to
 25 allegations specifically pertaining to Plaintiff and its counsel, which are based on
 26 personal knowledge. Plaintiff brings this action for damages and injunctive relief against
 27 defendant, demanding a trial by jury.
 28

CLASS ACTION COMPLAINT

NATURE OF THE ACTION

1 1. Plaintiff brings this class action against Google, Inc. ("Google") to recover
2 damages and other relief available at law and in equity on behalf of itself as well as on
3 behalf of the members of the following class:

4 *All persons or entities located within the United States who
5 created an AdWords campaign and were subsequently
6 charged for clicks from ads placed on parked domains.*

7 2. This action arises from Google's deceptive, fraudulent and unfair practice
8 of hiding the sources of invalid clicks from advertisers who seek on-line advertising
9 through Google's AdWords.

10 3. Google is commonly thought simply as an Internet search engine; in fact
11 Google's business is online advertising. Google's business model is primarily dependent
12 on connecting individuals who are searching the internet with advertisers who pay
13 Google (and others) for each time the linkage occurs. The Google Network is the largest
14 online advertising network in the United States.

15 4. AdWords is Google's primary advertising program and is the main source
16 of its revenue. Through AdWords, Google permits would-be advertisers to bid on words
17 or phrases that will trigger the advertisers' ads. AdWords is premised on a pay-per-click
18 ("PPC") model, meaning that advertisers pay only when their ads are clicked. In addition
19 to being displayed on Google.com, the ads from Google's customers can also be placed
20 on Google's "content network" which consists of sites that are not search engines. These
21 content network sites include "parked domains" which are websites with no other content
22 besides ads. This is done through the AdSense for Domains program, the other side of
23 the Google advertising model.

24 5. This action arises from the fact that Google does not disclose to its
25 advertisers the web addresses of the parked domains where their ads were placed, clicked
26 on and subsequently charged for. Google does this despite the fact that ads placed on
27 parked domains are a constant source of invalid clicks. By charging for clicks in a single

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844 South Figueroa Street, Suite 10017
Los Angeles, California 90017
(213) 217-5180

1 bulk, generic "parked domain" category, advertisers have no way to distinguish between
2 valid and invalid clicks from parked domains. Nonetheless, Google charges for all clicks
3 from parked domains, regardless of validity.

4

5 PARTIES

6 6. RK West, Inc. d/b/a Malibu Sales ("Plaintiff") is a California Corporation
7 doing business in the state of California. Plaintiff conducts a substantial predominance of
8 its business in California, where its headquarters are located, thus making California its
9 principal place of business. Accordingly, Plaintiff is a citizen of California. Plaintiff has
10 previously registered for an AdWords account and has also previously been charged for
11 clicks from ads placed on parked domains as more particularly described herein.

12 7. Plaintiff is informed and believes and thereon alleges that defendant
13 Google, Inc. ("Google") is a Delaware Corporation doing business in the state of
14 California. Plaintiff is informed and believes and thereon alleges that there is no one
15 state where Google conducts a substantial predominance of its business, making its
16 principal place of business the state where it is headquartered. Google's headquarters –
17 and, thus, its principal place of business – are located at 1600 Amphitheatre Parkway,
18 Mountain View, California. Accordingly, Defendant Google is a citizen of Delaware and
19 California.

20 8. Plaintiff does not know the true names or capacities of the persons or
21 entities sued herein as DOES 1 to 10, inclusive, and therefore sues such defendants by
22 such fictitious names. Plaintiff is informed and believes and thereon alleges that each of
23 the DOE defendants is in some manner legally responsible for the damages suffered by
24 Plaintiff and the members of the class as alleged herein. Plaintiff will amend this
25 complaint to set forth the true names and capacities of these defendants when they have
26 been ascertained, along with appropriate charging allegations, as may be necessary.

27
28

Kabateck Brown Kellner LLP
614 South Flower Street
Los Angeles, California 90017
(213) 217-5600

JURISDICTION AND VENUE

1
2 9. This Court has diversity subject matter jurisdiction over this class action
3 pursuant to 28 U.S.C. § 1332(d) in that this is a civil action filed under Rule 23 of the
4 Federal Rules of Civil Procedure and members of the class of plaintiffs are citizens of a
5 State different from defendant Google, and the aggregated amount in controversy exceeds
6 \$5,000,000, exclusive of interest and costs. See 28 U.S.C. § 1332(d)(2), (6).

7
8 10. Venue is proper in the Northern District of California pursuant to 28 U.S.C.
9 § 1331(a) in that: (1) Google resides in this judicial district; (2) a substantial part of the
10 events or omissions giving rise to the claims asserted herein occurred in this judicial
11 district; and (3) Google is subject to personal jurisdiction in the Northern District of
California.

FACTUAL BACKGROUND

12
13 11. Google offers advertisers two types of ads. The first is a search ad. When
14 an Internet user uses Google to search for a specific term or term, Google will display the
15 ads of advertisers who have bid for those particular keywords. The second type of ad is
16 contextual based ads, or content ads. These ads are shown on third party websites that
17 have content that matches the keywords bid on by the advertiser. For example, an ad for
18 a hardware store may be shown on a website that has content about home improvement
19 projects.

20
21 12. An internet domain refers to the web address associated with a particular
22 website. For example, the domain associated with the United States District Court in the
23 Northern District of California is "cand.uscourts.gov." Domains are acquired by
24 registering the name with an appropriate internet domain name registrar.

25
26 13. A parked domain refers to a web address pointing to a website which
27 contains no content besides ads. The domain name is registered for the sole purpose of
28 selling the domain name at a later date, or to generate ad revenue. Since the domain
name is no longer available for registration, it is commonly referred to as being "parked."

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644 South Figueroa Street, Suite 1700
Los Angeles, California 90017
(213) 217-5000

1 14. By default Google includes parked domains in its third party network.
2 Domains owners are compensated for clicks that occur in these content-less websites
3 through the Adsense for Domains program.

4 15. In order to advertise with Google, advertisers must register with AdWords,
5 Google's advertising program. After registration advertisers are able to change the
6 default option and exclude their ads from being placed on parked domains only after
7 engaging a complicated account settings page.

8 12. Plaintiff enrolled in AdWords in or around August 2006. Plaintiff created
9 several advertising campaigns for its online store business.

10 13. Plaintiff was charged for several clicks originating from parked domains,
11 with no additional information given by Google as to the nature or specific source of
12 these clicks beyond the designation "parked domain."

13 14. Plaintiff examined charges to its Adsense account from unknown domains
14 labeled only as "parked domains." Upon further inspection Plaintiff realized that this
15 traffic was being directed from parked domains which had little relation to its business,
16 yet generated traffic to its site.

17 15. Despite indication that some of the clicks from parked domains were
18 invalid, Google failed to disclose to the Plaintiff specific domains names in which these
19 ads were clicked on, making detection of invalid clicks difficult and even worse
20 concealing any evidence of invalid clicks.

21 16. Since Google profits from all generated clicks, regardless of validity they
22 benefit by actively hiding sources of invalid clicks being charged to its advertisers.
23 Hiding the source of parked domain clicks launders invalid clicks and makes any claims
24 of invalid clicks from these sites nearly impossible to show.

25

26 ///

27 ///

28 ///

Kabateck Brown Kellner LLP
654 South Figueroa Street
Los Angeles, California 90017
(213) 217-5000

CLASS ALLEGATIONS

1
2 16. Description of the Class: Plaintiff brings this nationwide class action on
3 behalf of himself and the Class defined as follows:

4 *All persons or entities located within the United States who
5 created an AdWords campaign and were subsequently
6 charged for clicks from ads placed on parked domains.*

7 17. Excluded from the Class are governmental entities, Defendant, any entity in
8 which Defendant has a controlling interest, and Defendant's officers, directors, affiliates,
9 legal representatives, co-conspirators, successors, subsidiaries, and assigns. Also
10 excluded from the Class is any judge, justice, or judicial officer presiding over this matter
11 and the members of their immediate families and judicial staff.

12 18. Plaintiff reserves the right to modify the class description and the class
13 period based on the results of discovery.

14 19. Numerosity: The proposed Class is so numerous that individual joinder of
15 all its members is impracticable. Due to the nature of the trade and commerce involved,
16 however, Plaintiff believes that the total number of class members is at least in the
17 hundreds of thousands and that the members of the Class are numerous and
18 geographically dispersed across the United States. While the exact number and identities
19 of class members are unknown at this time, such information can be ascertained through
20 appropriate investigation and discovery. The disposition of the claims of the Class
21 members in a single class action will provide substantial benefits to all parties and to the
22 court.

23 20. Common Questions of Law and Fact Predominate: There are many
24 questions of law and fact common to the representative Plaintiff and the proposed Class,
25 and those questions substantially predominate over any individualized questions that may
26 affect individual class members. Common questions of fact and law include, but are not
27 limited to, the following:

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64 South Figueroa Street
Los Angeles, California 90017
(213) 217-5000

- 1 a. Whether Google committed fraud if failed to disclose sources of
- 2 clicks from parked domains;
- 3 b. Whether or not Plaintiff and the members of the Class have been
- 4 damaged by the wrongs complained of herein, and if so, the measure
- 5 of those damages and the nature and extent of other relief that should
- 6 be afforded;
- 7 c. Whether Google engaged in unfair, unlawful and/or fraudulent
- 8 business practices; and
- 9 d. Whether Google failed to disclose material facts about the subject
- 10 Google Adwords program.

11 21. Typicality: Plaintiff's claims are typical of the claims of the members of
12 the Class. Plaintiff and all members of the Class have been similarly affected by
13 Defendant's common course of conduct since material information pertaining to the
14 source of clicks coming from parked domains was equally withheld from all.

15 22. Adequacy of Representation: Plaintiff will fairly and adequately represent
16 and protect the interests of the Class. Plaintiff has retained counsel with substantial
17 experience in prosecuting complex and class action litigation. Plaintiff and its counsel
18 are committed to vigorously prosecuting this action on behalf of the Class, and have the
19 financial resources to do so. Neither Plaintiff nor its counsel has any interests adverse to
20 those of the proposed Class.

21 23. Superiority of a Class Action: Plaintiff and the members of the Class have
22 suffered, and will continue to suffer, harm as a result of Defendant's unlawful and
23 wrongful conduct. A class action is superior to other available methods for the fair and
24 efficient adjudication of the present controversy as individual joinder of all members of
25 the Class is impractical. Even if individual Class members had the resources to pursue
26 individual litigation, it would be unduly burdensome to the courts in which the individual
27 litigation would proceed. Individual litigation magnifies the delay and expense to all
28 parties in the court system of resolving the controversies engendered by Defendant's

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844 South Figueroa Street
Los Angeles, California 90017
(213) 277-5000

1 common course of conduct. The class action device allows a single court to provide the
2 benefits of unitary adjudication, judicial economy, and the fair and equitable handling of
3 all class members' claims in a single forum. The conduct of this action as a class action
4 conserves the resources of the parties and of the judicial system, and protects the rights of
5 the class member. Furthermore, for many, if not most, Class members, a class action is
6 the only feasible mechanism that allows an opportunity for legal redress and justice.

7 24. Adjudication of individual Class members' claims with respect to the
8 Defendant would, as a practical matter, be dispositive of the interests of other members
9 not parties to the adjudication and could substantially impair or impede the ability of
10 other Class members to protect their interests.

11
12 **FIRST CAUSE OF ACTION**
13

UNJUST ENRICHMENT

14 25. Plaintiff realleges the preceding paragraphs as if fully set forth herein and,
15 to the extent necessary, pleads this cause of action in the alternative.

16 26. Through the actions described above, Google has received money
17 belonging to Plaintiff and the Class through the fees collected ads placed on third party
18 parked domain sites.

19 27. Additionally, Google has reaped substantial profit by concealing invalid
20 clicks from parked domains. Ultimately, this resulted in Google's wrongful receipt of
21 profits and injury to Plaintiff and the Class. Google has benefited from the receipt of
22 such money that it would not have received but for its concealment.

23 28. As a direct and proximate result of Google's misconduct as set forth above,
24 Google has been unjustly enriched.

25 29. Under principles of equity and good conscience, Google should not be
26 permitted to keep the full amount of money belonging to Plaintiff and the Class which
27 Google has unjustly received as a result of its actions.

28 WHEREFORE, Plaintiff and the Class pray for relief as set forth below.

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844 South Figueroa Street
Los Angeles, California 90017
(213) 217-5000

SECOND CAUSE OF ACTION

FRAUDULENT CONCEALMENT

3 30. Plaintiff realleges the preceding paragraphs as if fully set forth herein and,
4 to the extent necessary, pleads this cause of action in the alternative.

5 31. Google knew at all material times the source of invalid clicks from parked
6 domains, and that its customers would not be able to distinguish between valid and
7 invalid clicks from parked domains with the limited information that was provided to
8 them. These facts were not known to Plaintiff and the Class.

9 32. Google had a duty to disclose the above known material facts because it
10 knew that these material facts were unknown to Plaintiff and the Class, that Google was
11 in a superior position of knowledge with regard to its own technology, and Google chose
12 to make certain representations that presented only a part of the true story and thus misled
13 its customers.

14 33. Google's knowledge that advertisers would be charged for invalid clicks
15 hidden in the bulk AdWords charges from parked domains, combined with Google's
16 knowledge that Plaintiff and the Class relied or relies upon Google to communicate the
17 true state of facts relating to its AdWords program creates a legal obligation on Google's
18 part to disclose the source of clicks originating from parked domains.

19 34. Google intentionally concealed and/or suppressed the above facts with the
20 intent to defraud Plaintiff and the Class.

21 35. Plaintiff and the Class were unaware of the above facts and would not have
22 acted as they did if they had known of the concealed material facts.

23 36. Google's concealment of the above facts has caused damage to Plaintiff and
24 the Class in an amount to be shown at trial.

WHEREFORE Plaintiff and the Class pray for relief as set forth below.

36 | //

27 | //

28 //

THIRD CAUSE OF ACTION

**VIOLATION OF CALIFORNIA BUSINESS & PROFESSIONS CODE
SECTION 17200 ET SEQ.**

37. Plaintiff realleges the preceding paragraphs as if fully set forth herein and, to the extent necessary, pleads this cause of action in the alternative.

38. Plaintiff has standing to pursue this claim as Plaintiff has suffered injury in fact and has lost money or property as a result of Google's actions as delineated herein.

39. Class members have suffered injury in fact and have lost money or property as a result of Google's actions as delineated herein.

40. Google's actions as alleged in this complaint constitute an unfair or deceptive practice within the meaning of California Business and Professions Code sections 17200 *et seq.* in that Google's actions are unfair, unlawful and fraudulent, and because Google has made unfair, deceptive, untrue or misleading statements in

6 41. Google's business practices, as alleged herein, are unfair because they
7 offend established public policy and/or are immoral, unethical, oppressive, unscrupulous
8 and/or substantially injurious to consumers in that consumers are not informed of the
9 sources of invalid clicks for which they are charged for.

20 42. Google's business practices, as alleged herein, are unlawful because the
21 conduct constitutes fraudulent concealment, as well as the other causes of action herein
22 alleged.

23 43. Google's practices, as alleged herein, are fraudulent because they are likely
24 to deceive consumers.

25 44. Google's wrongful business acts alleged herein constituted, and constitute,
26 a continuing course of conduct of unfair competition since Google is marketing and
27 selling its products in a manner that is likely to deceive the public.

45 Google's business acts and practices, as alleged herein, have caused injury

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to Plaintiff, the Class and the public.

46. Pursuant to section 17203 of the California Business and Professions Code, Plaintiffs and the class seek an order of this court enjoining Google from continuing to engage in unlawful, unfair, or deceptive business practices and any other act prohibited by law, including those acts set forth in the complaint. Plaintiff and the Class also seek an order requiring Google to make full restitution of all moneys it wrongfully obtained from Plaintiff and the Class.

WHEREFORE Plaintiff and the Class pray for relief as set forth below.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff and members of the proposed Class request that the court enter an order or judgment against Defendant as follows:

1. Certification of the proposed Class and notice thereto to be paid by Defendant;
2. Adjudge and decree that Defendant has engaged in the conduct alleged herein;
3. For restitution and disgorgement on certain causes of action;
4. For an injunction ordering Defendant to cease and desist from engaging in the unfair, unlawful, and/or fraudulent practices alleged in the Complaint;
5. For compensatory and general damages according to proof on certain causes of action;
6. For special damages according to proof on certain causes of action;
7. For both pre and post-judgment interest at the maximum allowable rate on any amounts awarded;
8. Costs of the proceedings herein;
9. Reasonable attorneys fees as allowed by statute; and

27 //

28 | // /

1 10. Any and all such other and further relief that this Court may deem just and
2 proper.

3
4 Dated: July 17, 2008

KABATECK BROWN KELLNER, LLP

5 By:

6 BRIAN S. KABATECK
7 RICHARD E. KELLNER
8 ALFREDO TORRIOS
9 Attorneys for Plaintiff and proposed class

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11 Kabateck Brown Kellner LLP
12 642 South Figueroa Street
13 Los Angeles, California 90017
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DEMAND FOR JURY TRIAL.

Plaintiff hereby demands a trial by jury in the instant action.

Dated: July 17, 2008

KABATECK BROWN KELLNER, LLP

BY BRIAN S. KABATECK
RICHARD L. KELLNER
ALFREDO TORRIOS
Attorneys for Plaintiff and proposed class

Kabateck Brown Kellner LLP
600 South Figueroa Street
Los Angeles, California 90017

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is 644 South Figueroa Street, Floor, Los Angeles, CA 90017.

On August 29, 2008, I served the foregoing document described as **DECLARATION OF BRIAN S. KABATECK** on the interested parties in this action:

VIA U.S. MAIL - I deposited such envelope(s) with the United States Postal Service, enclosed in a sealed envelope, for collection and mailing with the United States Postal Service where it would be deposited for first class delivery, postage fully prepared, in the United States Postal Service that same day in the ordinary course of business. I am readily familiar with my employer's business practice for collection and processing of correspondence for mailing with the United States Postal Service.

VIA OVERNIGHT EXPRESS – I am readily familiar with the firm's practice of collection and processing for overnight delivery. Under that practice it would be deposited in a box or other facility regularly maintained by Overnight Express, or delivered to an authorized courier or driver authorized by Overnight Express to receive documents, in an envelope or package designated by Overnight Express with delivery fees paid or provided for, addressed to the person on whom it is to be served, at the office address as last given by that person on any document filed in the cause and served on the party making service; otherwise at that party's place of residence

Executed on August 29, 2008 at Los Angeles, California.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.


IRMA DELEON

1 SERVICE LIST
2

3 LEO P. NORTON
4 COOLEY GODWARD KRONISH LLP
4 4401 Eastgate Mall
5 San Diego, CA 92121
6 Telephone: (585) 550-6000
6 Facsimile: (858) 550-6420
7

8 *Attorneys for Google, Inc.*
8 (*Levitte v. Google, Inc.; RK West v. Google, Inc., and*
9 *Pulaski & Middleman v. Google, Inc.*)
10

11 CADIO ZIRPOLI
12 GUIDO SAVERI
12 RICHARD ALEXANDER SAVERI INC.
13 111 Pine Street, Suite 1700
14 San Francisco, CA 94111-5619
14 Telephone: (415) 217-6813
15 Facsimile: (415) 217-6813
16

17 *Attorneys for Plaintiff Pulaski & Middleman, LLC*
17 (*Pulaski & Middleman v. Google, Inc.*)
18

19 ADAM C. BELSKY
20 TERRY GROSS
21 MONIQUE ALONSO
21 GROSS & BELSKY ALONSO LLP
22 180 Montgomery Street, Suite 2200
23 San Francisco, CA 94104
23 Telephone: (415) 544-0200
24 Facsimile: (415) 544-0201
25

26 *Attorneys for Plaintiff Pulaski & Middleman, LLC*
26 (*Pulaski & Middleman v. Google, Inc.*)
27

1 KIMBERLY ANN KRALOWEC
2 WILLIAM F. JONCKHEER
3 SCHUBERT JONCKHEER KOLBE & KRALOWEE LLP
4 Three Embarcadero Center, Suite 1650
5 San Francisco, CA 94111
6 Telephone: (415) 788-4220
7 Facsimile: (415) 788-0161

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Attorneys for Plaintiff Hal K. Levittee
(Levittee v. Google, Inc.)